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BEFORE THE ARIZONA CORPORATE

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Arizona Corporation Commission
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IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF
LLC AGAINST JOHNSON UTILITIES
LLC

DOCKET NO. WS-02987A-13-0053

RESPONSE TO SWING FIRST GOLF'S
SUPPLEMENT TO COMPLAINT AND
MOTION TO STRIKE

Johnson Utilities, L.L.C. ("Johnson Utilities" or the "Company") hereby files its Response to the Supplement to Complaint ("Supplement") filed by Swing First Golf, LLC ("SFG") on May 8, 2013.¹ Pursuant to Rule 15(a) of the Arizona Rules of Civil Procedure, a supplemental pleading is not permitted except upon permission of the court, or the Arizona Corporation Commission ("Commission") in this case. Since SFG did not obtain the Commission's permission to file the Supplement, the Supplement should be stricken. Further, the Supplement adds nothing which should deter the Commission from granting the Motion to Dismiss and Motion to Strike on April 2, 2013. Finally, SFG's request that the Commission take no action on the Company's Petition to Amend Decision 71854 in Docket WS-02987A-08-0180 is outside the scope of this docket and should be rejected.

On May 13, 2013, SFG filed its Second Supplement to Complaint. Johnson Utilities will address this new filing by SFG in a separate filing.

I. SFG'S SUPPLEMENT SHOULD BE STRICKEN PURSUANT TO RULE 15(D) OF THE ARIZONA RULES OF CIVIL PROCEDURE.

Arizona Administrative Code R14-3-101(A) states, in relevant part, as follows:

¹ In this Response, Johnson Utilities has not attempted to address each and every misstatement, inaccuracy, allegation or argument in SFG's Supplement. In addition, the failure of the Company to address any allegation or argument of SFG in this Response should not be construed as an admission or waiver with respect to such allegation or argument.

1 In all cases in which procedure is set forth neither by law, nor by these rules, nor
2 by regulations or orders of the Commission, the Rules of Civil Procedure for the
3 Superior Court of Arizona as established by the Supreme Court of the state of
4 Arizona shall govern.

5 Rule 15(d) regarding Supplemental Pleadings in the Arizona Rules of Civil Procedure
6 states as follows:

7 Upon motion of a party the court may, upon reasonable notice and upon such
8 terms as are just, permit the party to serve a supplemental pleading setting forth
9 transactions or occurrences or events which have happened since the date of the
10 pleading sought to be supplemented. Permission may be granted even though the
11 original pleading is defective in its statement of a claim for relief or defense. If
12 the court deems it advisable that the adverse party plead to the supplemental
13 pleading, it shall so order, specifying the timer therefor. (Emphasis added).

14 SFG's Supplement is a "supplemental pleading" within the meaning of Rule 15(d), and
15 SFG failed to obtain permission from the Commission before filing the Supplement. Thus, the
16 Supplement should be stricken. Additionally, the Supplement relates to Count "A" (*Utility*
17 *Again Threatens to Withhold Effluent*) of SFG's Formal Complaint, and Count "A" is subject to
18 Johnson Utilities' pending Motion to Dismiss and Motion to Strike. SFG's Supplement is
19 effectively a second response to the Motion to Dismiss and Motion to Strike, which is not
20 permitted under the Commission's rules. It was improper for SFG to file the Supplement before
21 the Commission has ruled on the Company's Motion to Dismiss and Motion to Strike.

22 **II. SFG'S SUPPLEMENT ADDS NOTHING THAT SHOULD DETER THE**
23 **COMMISSION FROM GRANTING JOHNSON UTILITIES' MOTION TO**
24 **DISMISS AND MOTION TO STRIKE.**

25 SFG sounds the alarm in its Supplement that a "catastrophe is looming," but if a
26 catastrophe is in fact looming, it is being brought about solely by the voluntary actions of SFG.
27 SFG levels the ridiculous accusation that "Utility is using the threat of withholding Effluent
28 deliveries to try to extort huge additional payments from Swing First."² Unfortunately, this
over-the-top hyperbole illustrates the very reason it is so difficult for Johnson Utilities to work
with this customer. SFG attaches to its Supplement a copy of a May 3, 2013, e-mail from
Kenny Watkins, who works for Johnson Utilities, to Tim West, the golf course superintendent

² SFG Supplement to Complaint at p. 1, lines 5-6.

1 for SFG. The e-mail, which is the source of the alleged "threats" and "extortion," was a
2 response to an e-mail from Mr. West requesting 700,000 gallons of effluent per day during the
3 month of May. How did Mr. Watkins respond? Certainly, not with threats and extortion.
4 Rather, he responded professionally and constructively, stating in part as follows:

5 As you know, Johnson Utilities can deliver as much water as Swing First Golf
6 requests using a combination of effluent, Central Arizona Project water, and if
7 necessary, non-potable groundwater. Therefore, we can certainly deliver 700,000
8 gallons of water or more per day if SFG requests. I understand your desire to
9 receive effluent because it is cheaper water compared to the other sources.
10 However, with the variability of the influent flow rates at the San Tan wastewater
11 treatment plant, capacity constraints on the delivery of effluent through the
12 existing pipeline to the golf course, and the competing demand for effluent from
13 Johnson Utilities' other effluent customer, we simply cannot commit to deliver
14 700,000 gallons per day of effluent to the golf course. That being said, we will
15 continue to work to deliver as much effluent as we can on a daily basis given the
16 constraining factors listed above. We can also deliver CAP water in whatever
17 additional quantities SFG may reasonably request at the current rate of \$0.84 per
18 thousand gallons plus applicable taxes. In addition, we have a newly approved
19 tariff for non-potable water service where we can deliver non-potable
20 groundwater at a rate of \$0.84 per thousand gallons plus applicable taxes,
21 including a Central Arizona Groundwater Replenishment District Charge of \$1.51
22 per thousand gallons.³ (Emphasis added).

23 The alleged "catastrophe that is looming" is caused by SFG's refusal to accept any water
24 source other than effluent to water the golf course. SFG asserts that without sufficient effluent,
25 turf will die, fish will die and the golf course irrigation system will be damaged.⁴ However,
26 Johnson Utilities confirmed without qualification in Mr. Watkins' e-mail that the Company "can
27 deliver as much water as Swing First Golf requests using a combination of effluent, Central
28 Arizona Project water, and if necessary, non-potable groundwater." Acknowledging that
effluent is cheaper water compared to other sources, Johnson Utilities further confirmed that
"we will continue to work to deliver as much effluent as we can on a daily basis given the
constraining factors listed above."

As stated in Mr. Watkins' e-mail, there are existing constraints which limit the
Company's ability to deliver effluent to SFG including "the variability of the influent flow rates
at the San Tan wastewater treatment plant, capacity constraints on the delivery of effluent

³ Exhibit A, SFG Supplement to Complaint.

⁴ SFG Supplement to Complaint at p. 2, lines 3-4.

1 through the existing pipeline to the golf course, and the competing demand for effluent from
2 Johnson Utilities' other effluent customer." These are actual and legitimate constraints which
3 make it impossible at this time for Johnson Utilities to deliver 700,000 gallons of effluent per
4 day to SFG. Thus, SFG must accept the fact that it cannot satisfy all of its golf course water
5 demand using effluent only, and it must necessarily accept other supplemental supplies of water
6 from Johnson Utilities.

7 SFG demands that Johnson Utilities disregard the request for effluent from its other
8 effluent customer, the San Tan Heights Homeowners Association ("San Tan Heights HOA" or
9 "Association"), at least until the Company first satisfies the full request of SFG.⁵ However, like
10 SFG, the San Tan HOA has also requested as much effluent as Johnson Utilities can deliver,
11 seeking to realize the cost savings of the cheaper effluent for the 3,200 residents who comprise
12 the Association. And like SFG, the San Tan HOA also designed its irrigation system to use
13 effluent when available.

14 SFG simply does not have a priority right to effluent over the San Tan Heights HOA.
15 While SFG claimed in its 2008 Formal Complaint⁶ (and then again in this docket) that it had a
16 priority right over the San Tan Heights HOA to the Company's effluent, SFG voluntarily
17 withdrew the 2008 complaint without ever establishing the legality or validity of such a priority
18 right. The Commission subsequently dismissed the 2008 Formal Complaint with prejudice in
19 Decision 73137, finding as follows:

20 Swing First has stated it is aware that withdrawal of its Amended Complaint with
21 prejudice will foreclose Swing First from raising those claims again before the
22 Commission even if the Superior Court decides its claims are more appropriately
23 within the Commission's jurisdiction. Therefore, Swing First has accepted the
24 risk that [the] Superior Court may or may not address the common claims raised
25 in the Amended Complaint and the Superior Court case.⁷

26 In the second of two Maricopa County Superior Court trials,⁸ the jury awarded SFG
27 \$41,883.11⁹ in its dispute with Johnson Utilities over bills for water deliveries from late 2004

⁵ The San Tan Heights HOA has been an effluent customer of Johnson Utilities since January 2007.

⁶ Docket No. WS-02987A-08-0049.

⁷ Decision 73137 at Finding of Fact 114.

⁸ The jury verdict in the first trial regarding the billing dispute between the parties was set aside by the judge because it was contradictory and irreconcilable.

1 through the date of the trial in early 2013.¹⁰ However, the jury made no findings that: (i) SFG
2 has a priority right to the effluent of Johnson Utilities; (ii) Johnson Utilities must satisfy the
3 effluent requests of SFG before it can deliver effluent to any other customer such as the San Tan
4 Heights HOA; (iii) Johnson Utilities must deliver effluent in whatever quantities are requested
5 by SFG; or (iv) Johnson Utilities withheld effluent from SFG. Likewise, the proposed form of
6 judgment lodged with the Superior Court by SFG contains no such findings. Thus, SFG must
7 accept the fact that it cannot satisfy all of its golf course water demand using only effluent, and it
8 must necessarily accept other supplemental supplies of water from Johnson Utilities.

9 SFG states in the Supplement that it “long expected to receive Effluent from Utility once
10 its Santan Wastewater Treatment Plant was completed,” and that “Swing First caused the
11 necessary facilities to be constructed to allow it to receive Effluent.”¹¹ The same could certainly
12 be said of the San Tan Heights HOA. However, notwithstanding its “expectation,” SFG never
13 established a basis for a priority to effluent over the competing request of the San Tan HOA (or
14 any other customer for that matter). The failure to demonstrate a priority comes after two
15 separate opportunities to make its case—first in Docket WS-02987A-08-0049 (where SFG
16 voluntarily withdrew its 2008 Formal Complaint with prejudice) and then in the ensuing
17 Maricopa County Superior Court litigation (Docket CV2008-000141). In addition, it should
18 also be noted that SFG also raised its claims regarding its right to effluent in the last Johnson
19 Utilities rate case (Docket WS-02987A-08-0180).

20 The absence of a priority to effluent for SFG is further corroborated by the Fourth
21 Amendment (“Fourth Amendment”) to the Purchase and Sale Agreement under which SFG
22 acquired the Johnson Ranch Golf Club from Johnson Ranch Holdings, LLC.¹² Section 7 of the
23 Fourth Amendment captioned “Utility Agreement” states as follows:

24
25 ⁹ The amount of the award is subject to appeal.

26 ¹⁰ The Superior Court has not issued a final judgment in the case as of the filing of this response. The
27 jury verdict form states a dollar amount but provides no explanation regarding the basis or calculation of
the award.

28 ¹¹ SFG Supplement to Complaint at 2, lines 10-12.

¹² Johnson Ranch Holdings, LLC, has no legal relationship to Johnson Utilities, LLC, or any affiliate of
Johnson Utilities, LLC.

1 With respect to Section 8.22 of the Purchase Agreement, Buyer and Seller have
2 determined that there will be no assignment by Seller [Johnson Ranch Holdings,
3 LLC] to Buyer [Swing First Golf] of any existing agreements between Seller and
4 any of the Johnson Entities, that Seller and Buyer will not jointly enter into any
5 new agreement with any of the Johnson Entities for service to the Property, and
6 that Buyer will be responsible for obtaining water service and effluent to the
7 Property after Closing. (Emphasis added)

8 Additionally, Section 8 of the Fourth Amendment captioned "Construction of Effluent
9 Line" provides in relevant part as follows:

10 Seller [Johnson Ranch Holdings, LLC] agrees to construct or cause to be
11 constructed, at its sole cost and expense, in a good, workmanlike and lien-free
12 manner, and in accordance with the requirements of applicable governmental
13 authorities and the reasonable requirements of the Johnson Entities, an 8-inch
14 underground line that ties into the effluent main line adjacent to the Property and
15 extends to the lake located within the Property (the "Effluent Line") in order to
16 permit delivery of effluent from such effluent main line to such lake if and when
17 effluent for the Property is available from the Johnson Entities, together with a
18 water meter as required by the Johnson Entities and a backflow device if required
19 by applicable governmental authorities of the Johnson Entities. The availability
20 (if any) and cost of effluent for delivery through the Effluent Line are matters not
21 within Seller's control, and Seller shall have no liability or responsibility with
22 respect thereto. (Emphasis added)

23 SFG states that rates for other supplies of water are significantly higher than the effluent
24 rate.¹³ While the current effluent rate is a relatively low rate at \$0.63 per thousand gallons, the
25 current rate for Central Arizona Project ("CAP") water is \$0.84 per thousand gallons, a
26 difference of only \$0.21 per thousand gallons. Using SFG's hypothetical, which assumes that
27 the golf course purchases 250,000 gallons per day for 182 days (May through October) from a
28 source other than effluent,¹⁴ the difference in cost between effluent and CAP water over the five-
month period is \$9,555,¹⁵ plus the monthly CAP meter charge of \$550.

SFG asserts in its Supplement that "Utility likely cannot supply significant quantities of
CAP Water."¹⁶ This assertion is based upon a statement in Decision 73521 (Docket WS-
02987A-12-0350) that "the CAP has advised the Company that it will no longer offer excess

¹³ SFG Supplement to Complaint at p. 2, lines 23-25.

¹⁴ *Id.* at p. 3, lines 12-14.

¹⁵ Calculated as follows: 182 days x 250,000 gallons = 45,500,000 gallons; 45,500,000 gallons / 1,000 = 45,500; 45,500 x \$0.21 = \$9,555.

¹⁶ SFG Supplement to Complaint at p. 3, lines 1-2.

1 CAP water for sale after December 31, 2012.”¹⁷ However, in a memo dated September 12,
2 2012, the CAP announced that it would extend the small user exception to the CAWCD
3 procedure to distribute excess CAP water through 2014, thereby permitting Johnson Utilities to
4 acquire excess CAP water through the end of 2014. Johnson Utilities ordered excess CAP water
5 for 2013 and intends to do the same in 2014. In addition, the Company is considering the
6 feasibility of submitting an application to the CAP for an allocation of Non-Indian Agricultural
7 (“NIA”) water later this summer. If the Company is successful in obtaining an NIA allocation
8 for recharge, it will continue to have access to CAP water beyond 2014.

9 Upon receipt of Commission approval, Johnson Utilities could also provide water to
10 SFG under its new Non-Potable Water Service tariff (“Non-Potable Tariff”). Water under the
11 Non-Potable Tariff is priced at \$0.84 per thousand gallons, the same as the current CAP water
12 rate. However, water delivered under the Non-Potable Tariff is groundwater subject to the
13 current Central Arizona Water Conservation District adjuster charge of \$1.51 per thousand
14 gallons which is paid by all customers of Johnson Utilities within the Phoenix Active
15 Management Area who receive groundwater. Thus, while it is more expensive than effluent or
16 CAP water, SFG could purchase water from Johnson Utilities under the Non-Potable Tariff if
17 authorized.

18 As the Company has clearly communicated to SFG, “Johnson Utilities can deliver as
19 much water as Swing First Golf requests using a combination of effluent, Central Arizona
20 Project water, and if necessary, non-potable groundwater.”¹⁸ Thus, there is no legitimate reason
21 why “turf will die, fish will die and the irrigation system will be damaged,” as alleged by SFG.
22 Further, Johnson Utilities acknowledges that effluent is the desired choice of supply for SFG
23 because of its lower cost, as it is for the San Tan HOA. Therefore, the Company will continue
24 to work to deliver as much effluent to SFG as it can on a daily basis, subject to constraining
25 factors noted in the Watkins’ e-mail including variability in the influent flow rates at the San
26 Tan wastewater treatment plant, capacity constraints on the delivery of effluent through the
27

28 ¹⁷ Decision 73521 at p. 2, lines 12-13.

¹⁸ Exhibit A, SFG Supplement to Complaint.

1 existing pipeline to the SFG golf course, and the competing demand for effluent from the San
2 Tan Heights HOA. Regarding the latter constraint, Johnson Utilities will allocate available
3 effluent between SFG and the San Tan Heights HOA on an equitable basis, consistent with
4 sound operational practices at the San Tan wastewater treatment plant.

5 **III. SFG'S REQUEST FOR RELIEF REGARDING THE COMPANY'S**
6 **PETITION TO AMEND DECISION 71854 IN DOCKET WS-02987A-08-**
7 **0180 IS OUTSIDE THE SCOPE OF THIS DOCKET AND SHOULD BE**
8 **REJECTED.**

9 In Section III of its Supplement, SFG asserts that the Commission should not grant
10 Johnson Utilities' request to amend Decision 71854 in Docket WS-02987A-08-0180. This
11 claim by SFG does not belong in this complaint docket and the relief requested by SFG cannot
12 be granted in this docket. SFG is an intervenor in Docket WS-02987A-08-0180 and has already
13 made a filing dated April 19, 2013, in that docket with regard to the Company's petition. Thus,
14 Section III of the Supplement should be stricken.

15 **IV. REQUEST FOR FORMAL ADMONISHMENT OF SFG.**

16 There is one final serious matter that Johnson Utilities is compelled to address. No less
17 than five times in a four-page pleading, SFG accuses Johnson Utilities of extortion, a felony
18 under Arizona's criminal code.¹⁹ This type of reckless, irresponsible and unprofessional
19 allegation has no place in a filing before this Commission or any other judicial body, and
20 Johnson Utilities requests that the Commission formally admonish SFG to cease and desist from
21 making such libelous statements in the future. Providing water service pursuant to rates and
22 charges contained in tariffs approved by the Commission is not extortion, and the Commission
23 should not allow such scurrilous accusations. Allegations of criminal conduct against Johnson

24 ¹⁹ Under A.R.S. §13-1804, a person commits "theft by extortion" by knowingly obtaining or seeking to
25 obtain property or services by means of a threat to do in the future any of the following: cause physical
26 injury to anyone by means of a deadly weapon or dangerous instrument or cause death, serious physical
27 injury or physical injury to anyone; cause damage to property; engage in other conduct constituting a
28 criminal offense; accuse anyone of a crime or bring criminal charges against anyone; expose a secret or
asserted fact (whether true or false) tending to subject anyone to hatred, contempt, or ridicule, or to
impair the person's credit or business; take or withhold action as a public servant or cause a public
servant to take or withhold action; cause anyone to part with any property; or take or withhold action
regarding an alleged claim of easement or other right of access to adjoining property under circumstances
set forth in the statute.

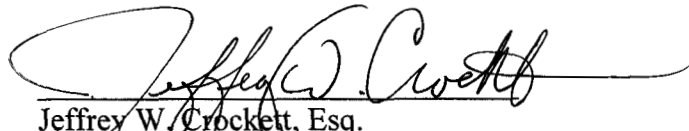
1 Utilities are obviously harmful to the Company, its owners, its employees (including Mr.
2 Watkins) and by extension, the customers.

3 V. CONCLUSION.

4 For all of the reasons set forth herein, the Supplement to Complaint filed by SFG in this
5 docket should be stricken. SFG failed to obtain permission from the Commission to file the
6 Supplement as required by Rule 15(d) of the Arizona Rules of Civil Procedure. Moreover, the
7 Supplement adds nothing which should deter the Commission from granting the Motion to
8 Dismiss and Motion to Strike filed by Johnson Utilities on April 2, 2013. Further, SFG's
9 request that the Commission take no action on the Company's Petition to Amend Decision
10 71854 in Docket WS-02987A-08-0180 is outside the scope of this docket and should be
11 rejected. Finally, Johnson Utilities requests that the Commission admonish SFG to cease and
12 desist from making accusations of extortion against the Company.

13 RESPECTFULLY submitted this 14th day of May, 2013.

14 BROWNSTEIN HYATT FARBER SCHRECK LLP

15 

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24 COPY of the foregoing hand-delivered
25 this 14th day of May, 2013, to:

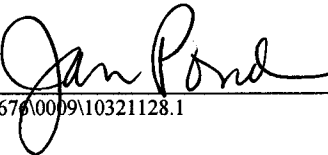
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